



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of. MaineTech Development Company; JAC/CO/SAC

File: B-243111; B-243111.2; B-243111.3

Date: July 2, 1991

Peter J. Comodeca, Esq., Calfee, Halter & Griswold for MaineTech Development Company; Jerome B. Goldsmith, Esq., Linscott, Slater & Goldsmith for JAC/CO/SAC, the protesters. Michael F. King, Department of Agriculture, for the agency. Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contention that award determination was improperly made by other than contracting officer is denied where record indicates that contracting officer did make the award selection. Review of this selection decision by the contracting officer's supervisor was appropriate.
2. Protest that awardee's offer did not comply with the solicitation lease requirements because its offer included an additional 5-year renewal option which was not a solicitation requirement is denied where this additional option was not evaluated by the agency or considered in the award selection.
3. Lease term correction is proper where the agency made a clerical error in drafting the original lease agreement, the correction is ratified by both the awardee and the contracting officer and the terms of the corrected lease conform to the solicitation terms.
4. Protest that agency failed to conduct meaningful discussions is denied where the protester was reasonably advised of the general area of deficiencies in its proposal and was given an opportunity to cure those deficiencies.
5. Where base operating costs are subject to escalation over the term of a contract, allegation that awardee listed unrealistically low operating costs does not provide a basis to protest since submission of a below-cost offer is legally unobjectionable, and the record establishes that the awardee will merely escalate operating costs based on the consumer price index applied to the items which it included in this category, an option permitted by the solicitation.

DECISION

MaineTech Development Company and JAC/CO/SAC protest the award of a contract to Gary J. Hagan under an unnumbered request for proposals (RFP) issued by the Soil Conservation Service (SCS), Department of Agriculture (USDA) for the lease of office space in the Bangor, Maine area. The protesters contend essentially that the agency favored Hagan, with MaineTech arguing, specifically, that the decision to award to Hagan was not made by the contracting officer, the awardee's best and final offer (BAFO) did not comply with the solicitation requirements, the contract awarded to Hagan is illegal, and the agency did not conduct meaningful negotiations with MaineTech. JAC/CO/SAC argues that the awardee submitted understated cost estimates and that the agency should have adjusted the awardee's costs to reflect annual increases in municipal real estate taxes over the term of the lease. Finally, JAC/CO/SAC contends that the contract awarded is "fraudulent."

We deny the protests.

BACKGROUND

The RFP, issued on December 17, 1990, contemplated the award of a firm, fixed-price contract with annual operating cost adjustments for the lease of 8,735 square feet of office space for SCS in Orono, Veazie, or Bangor, Maine for a 5-year base period, with one 5-year option. Offerors were required to submit initial offers by January 8, 1991, including a "schematic floor plan . . . indicating the space offered and showing the location of all existing windows, entrances, corridors, partitions, and exits." The solicitation indicated that the "[p]roposed space must be able to conform to an acceptable configuration" Square footage requirements for each of 12 offices, 1 computer room, 1 open storage area and 5 other open areas were also provided.

The RFP price evaluation provisions, paragraphs D2 through D4, provided that offerors were to submit their offers on the basis of price per square foot and to "break out their offers to a 'net' price per square foot for rental and a 'base' price per square foot for services and utilities (operating expenses) to be provided by the lessor." The net and base prices combined equal the total "gross" annual per square foot price offered. Evaluation was to be made on the basis of this annual per square foot cost, plus the estimated cost of escalation for operating costs if the offer included a provision for escalation. Each offeror was to indicate in paragraph D3 a dollar figure for the base for the operating costs subject to escalation and whether it would apply the

actual cost escalator outlined in paragraph D4, or the RFP's Consumer Price Index (CPI) escalator clause. An offeror could also elect to take no escalation on operating costs. The solicitation provided that the lease would be awarded to the offeror whose offer would be most advantageous to the government, price and other factors considered.

Three offers were submitted by the January 8 closing date. After the initial evaluation, the agency conducted negotiations with all three offerors and requested BAFOs by February 12, 1991. Based on its evaluation of the BAFOs, SCS determined that MaineTech's proposal, which was the lowest priced, would not meet agency requirements because the proposed floor plan did not provide an acceptable configuration. Specifically, MaineTech's proposal was considered technically unacceptable because its floor plan could not accommodate traffic flow and keep traffic away from the administrative office section.

The JAC/CO/SAC offer, which satisfied the solicitation requirements, proposed a site in Bangor, which the agency believed would increase its expenses. JAC/CO/SAC's floor plan included two stories which was permitted by the solicitation, but the agency believed that it would make possible future expansion more difficult.

SCS determined that the Hagan offer complied fully with the standards and specifications in the solicitation. The site, offered in Orono, was viewed as keeping other associated costs low and the one-story floor plan allowed for easy expansion. Hagan's price was evaluated as lower than JAC/CO/SAC's. Award was made to Hagan on the basis that its offer was most advantageous to the government and these protests followed.

DECISION TO AWARD

MaineTech alleges that the decision to award to Hagan was made by the State Conservationist rather than the contracting officer and thus violates Federal Acquisition Regulation (FAR) § 15.604(c)(4), which provides that the contracting officer is responsible for selecting the source for contract award and FAR § 1.602-1, which lists contract award selection as one of the contracting officer's responsibilities.^{1/} MaineTech argues that the contracting officer cannot abdicate his decision-making power, as MaineTech alleges was done here. MaineTech bases this allegation primarily on the contracting officer's hand-written memo to the contract file, dated February 21, which reads that "[a]fter some discussion and

^{1/} The State Conservationist is the senior representative of SCS in Maine and is the contracting officer's supervisor.

each one giving our point of view, [the State Conservationist] made the determination that the award would be made to Hagan Construction."

The agency asserts that the decision to award was made by the contracting officer. The agency points to the contracting officer's February 12 hand-written memo, titled "Evaluation [and] Analysis of Bids for [State Office] Space," which includes the recommendation that "the award of the lease contract be made to Gary J. Hagan." The agency argues that the State Conservationist was involved in the decision only to permit the contracting officer to ensure that sufficient funds were available. The agency further contends that the decision referenced in the February 21 memo concerned only the issue of "co-location," which is an agency policy concerning placement of various USDA agencies in a single location in order to gain certain economies. One of the offers allowed for co-location, and the agency explains that the State Conservationist's decision referenced in the February 21 memo was a determination that the increased cost of that offer was not worth the economies to be gained from co-location. The agency says that once the issue of funds was determined by the State Conservationist, the contracting officer "acting upon his own determination," made the award to Hagan.

Under these circumstances, we do not believe that the one brief sentence in the February 21 memo establishes that the contracting officer "abandoned" his decision-making responsibility where the record otherwise evidences that the contracting officer did make the award decision. Further, there is nothing improper in the review of the contracting officer's award selection by a higher agency official. Agency officials' authority to direct and supervise all agency functions encompasses procurement operations, including a contracting officer's award decision. See FAR § 15.604(a); Bank Street College of Educ., 63 Comp. Gen. 393 (1984), 84-1 CPD ¶ 607; AFL-CIO Appalachian Council, Inc., B-216878, Apr. 12, 1985, 85-1 CPD ¶ 419.

AWARDEE'S BAFO

MaineTech next asserts that the awardee's BAFO did not comply with the RFP lease requirements. The awardee offered a base lease term of 5 years and two 5-year options and the solicitation required a base term of 5 years and only one 5-year option. MaineTech argues that Hagan, by offering two 5-year options, could lower its annual square foot rate by spreading costs over a longer term.

We find that Hagan's BAFO complied with the solicitation performance requirements. The solicitation required offerors to offer a base lease period of 5 years and one 5-year option

period, which Hagan's offer did, thereby satisfying the RFP performance obligation. The record shows that the additional 5-year option offered by Hagan was neither evaluated by SCS nor considered in the award selection. The second 5-year option period offered by Hagan merely extended the effective period during which the government could lease the office space at the quoted annual square footage rates, an unobjectionable option which, on its face, is favorable to the government. See generally Buffalo Central Terminal, Ltd., B-241210, Jan. 29, 1991, 91-1 CPD ¶ 82.

CONTRACT AWARDED IS ILLEGAL

On February 22, 1991, the agency and Hagan entered into a contract for the lease of office space in Orono for the term beginning on July 1, 1991 through June 30, 2011, with one 5-year renewal option. The agency subsequently determined that the original lease document reflected a clerical error with respect to the 20-year base lease term and corrected this mistake by Supplemental Lease Agreement, Form AD-276, dated April 18, signed by Hagan and the contracting officer, which states that the original lease is amended to read "... for the term beginning on July 1, 1991 through June 30, 1996"

Both MaineTech and JAC/CO/SAC argue that the contract, as awarded, is illegal and/or "fraudulent" because, while the solicitation required a 5-year lease period with one 5-year option, the contract was awarded for a 20-year base term with one 5-year option. MaineTech also argues that there is no evidence that Hagan was mistaken in its belief that it was signing a 20-year lease and JAC/CO/SAC alleges that Hagan obtained its mortgage loan for the project upon the representation that it had a 20-year lease for the building.

The agency agrees that it cannot award a 20-year lease and asserts that it merely corrected the clerical error in the lease agreement. The record evidences that parties to the lease did agree on the 5-year base period of performance, and there was a mutual mistake which has been corrected. We find no basis to object to the agency's correction of its clerical error concerning the base contract period in the original lease and issuing a supplemental lease with lease terms which conform to the terms of the solicitation. Veterans Admin.- Washington State Sales and Use Tax, 64 Comp. Gen. 718 (1985), 85-2 CPD ¶ 361. The material presented by Hagan to its bank or other lending institution in order to obtain a mortgage concerns an issue between outside parties which is not for review by our Office. Ideal Aviation, Inc., B-235165, May 9, 1989, 89-1 CPD ¶ 438.

NEGOTIATIONS WERE MEANINGLESS

MaineTech next argues that the negotiations between it and the agency were meaningless because the agency never advised it of the corridor deficiency in its floor plan which made its offer unacceptable. MaineTech acknowledges that, on February 5, the contracting officer visited MaineTech's proposed site and that "the corridor issue was discussed," but maintains that the agency never specifically told MaineTech that "any floor plan without a corridor would be rejected out-of-hand." According to MaineTech, its representative told the contracting officer that MaineTech would submit its BAFO without a corridor but, if the contracting officer or the agency had concerns over the corridor, he should let MaineTech know before MaineTech submitted its BAFO. The protester states that the contracting officer never responded to this statement and MaineTech was never advised to put a corridor in its BAFO. By letter dated February 13, the contracting officer informed MaineTech that, after reviewing the plans it submitted with its BAFO, the agency "would not be able to utilize the space without a corridor up the middle to take traffic away from the State Conservationist office and the staff for administration." The protester admits that while the record shows a "concern" over the corridor, the record does not "reflect that MaineTech was told that its non-corridor floor plan was unacceptable to the [g]overnment." The protester says that "[i]f a corridor was required, the contracting officer should have gotten back to [our representative] after the February 5, 1991, site visit but before best and final offers were submitted as MaineTech requested"

The requirement for discussions with offerors is satisfied by advising them of deficiencies in their proposals and affording them the opportunity to satisfy the government's requirements through the submission of revised proposals. FAR § 15.610(c)(2), (5); Buffalo Central Terminal, Ltd., B-241210, supra. Although agencies are not obligated to afford offerors all-encompassing discussions, Training and Mgmt. Resources, Inc., B-234710, June 29, 1989, 89-2 CPD ¶ 12, or to discuss every element of a technically acceptable competitive range proposal that has received less than the maximum possible score, see Associated Chem. and Envtl. Servs., et al., 67 Comp. Gen. 314 (1988), 88-1 CPD ¶ 248; Federal Data Corp., B-236265.4, May 29, 1990, 90-1 CPD ¶ 504, they still generally must lead offerors into the areas of their proposals which require amplification. Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400.

Here, the record establishes that SCS satisfied its obligation to conduct meaningful discussions with MaineTech. While MaineTech now asserts that it would have proposed a corridor

in its floor layout had this matter been raised in discussions, it is clear that the contracting officer indicated to MaineTech that this area of its proposal was considered weak by SCS, and the protester was warned that it should include a corridor in its floor plans to ease traffic flow. MaineTech's response proposing to use the floor plan without the corridor demonstrates that the firm was aware of the perceived deficiency but chose to disregard the agency's concerns.

PRICE EVALUATION


Finally, JAC/CO/SAC argues that Hagan's base operating costs, listed as \$12,753 in paragraph D3 of its offer, were unrealistically low. Specifically, JAC/CO/SAC contends that Hagan omitted or understated the cost of property taxes which JAC/CO/SAC argues would be \$13,000 alone, and that heating oil and other utilities would bring Hagan's base operating costs to \$26,000. Hagan argues that the solicitation "addendum" at paragraph D4 permits the lessor to request an adjustment in rental rates based on an increase or decrease in the cost of utilities, including electricity, water and sewage, heating oil and real estate taxes. Therefore, JAC/CO/SAC argues that increases in real estate taxes over the base year would be borne entirely by the government and the lower Hagan's initial estimate, the more the government may pay for years 2 through 5.

As the agency notes, Hagan provided in its offer that its operating costs would be adjusted on a CPI basis and listed the operating costs subject to this adjustment as \$12,753. The agency acknowledges that this \$12,753 figure is relatively low and says that it questioned these costs. Hagan responded that it understood that the \$12,753 figure would be to calculate annual escalation and that it "wished to have this amount stand." Since, under the CPI escalation clause, taxes are not part of the escalation and no escalation of taxes has been negotiated with Hagan, the agency calculated the operating costs per square foot, based on \$12,753, and escalated this base cost by 4 percent each year. As noted above, Hagan's price was low for the base 5-year period and for the option period.

As to JAC/CO/SAC's allegation that Hagan's base operating costs are unreasonably low, the submission of a below-cost offer by itself is legally unobjectionable. Hose-McCann Tel. Co., Inc., B-240382.3, Sept. 24, 1990, 90-2 CPD ¶ 252. Regarding the escalation of these base operating costs, the protester has misread the solicitation provisions. As noted above, an offeror could elect to escalate its operating costs by the actual cost escalator or by the CPI escalator. The protester seems to interpret the actual cost escalator clause as a separate part of the solicitation, an "addendum" that may

be applied by an offeror in addition to the CPI escalator. However, the only reasonable interpretation of these clauses is that presented by the agency: the Escalator Clause in paragraph D4 gives the offeror an option in calculating increases in operating costs and is part of the price determination. Indeed, since the solicitation must be read and interpreted as a whole, National Projects, Inc., 69 Comp. Gen. 229 (1990), 90-1 CPD ¶ 150, it would be unreasonable to assume that an offeror under paragraph D2 could escalate operating costs based on CPI and then also escalate operating costs based on actual costs under paragraph D4. Therefore, the paragraphs consist of mutually exclusive choices only one of which each offeror may elect. Since Hagan chose to escalate based on CPI and taxes are not part of the CPI escalation, there is nothing objectionable about the agency's price determination.

The protests are denied.


for James F. Hinch, Jr.
General Counsel